SUPREME COURT, U. S.
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JOHN F. DAVIS, CLE

No. 420

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JEROME S. GLAZER, LOUIS A. GLAZER, *Petitioners,*

v.

GUILFORD GLAZER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 10, 1967. (p. 44a, *infra.*) Petitioners' motion for a rehearing was denied on May 2, 1967. (*Ibid.*)

OPINION BELOW

The District Court issued no opinion. Its rulings on petitioners' alternative motions for judgment notwithstanding the verdict or for a new trial or a remittitur are unreported and are printed in the Appendix hereto (p. 1a, *infra*). The opinion of the Fifth Circuit, printed in the Appendix hereto (pp. 2a-43a, *infra*), is reported in 374 F.2d 390 (1967).

JURISDICTION

The judgment of the Fifth Circuit was entered on January 10, 1967. Petitioners' petition for rehearing was filed on January 30, 1967, and denied on May 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does Rule 50(c)(1) of the Federal Rules of Civil Procedure permit a court of appeals to uphold denial of an alternative motion for a new trial where the trial court, contrary to the mandatory requirement of that rule, failed to specify the grounds of its action?

2. In a contract suit brought in federal court on diversity grounds can the trial judge require the jury to perform the purely judicial function of deciding whether the contract was ambiguous or unambiguous and whether to consider or disregard extrinsic evidence?

3. Can a trial judge affirmatively require a jury to pass upon an inflammatory allegation against petitioners, specifically one of "conspiracy," and yet prohibit the jury, in disposing of that issue, from considering evidence rebutting the allegation?

RULES INVOLVED

The pertinent provisions of Rule 50(c)(1) of the Federal Rules of Civil Procedure are as follows:

> "(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial."

STATEMENT

Respondent brought this diversity action in the United States District Court for the Eastern District of Louisiana for conspiracy to breach and resulting breach of a December 1957 agreement. (R. 1-5.)* The agreement had sought to resolve intra-family strife concerning a number of business enterprises. The complaint was filed after petitioners, who are majority stockholders of the family corporations, voted not to re-elect respondent to his various positions in the family corporations.

The parties disagreed as to the enforceability and meaning of the 1957 agreement. Respondent urged that it entitled him to remain as a director and officer in each of the family corporations for an indefinite period of time. Petitioners contended, among other things, that the agreement was unenforceable because of its indefinite duration and that, in any event, it did not affect their right, as majority stockholders, to vote respondent out of his corporate positions.

The trial court (Ellis, J.) gave no instructions to the jury as to whether the 1957 agreement was or was not ambiguous. Instead, he left that judicial determination to the jury. In a confused instruction, he charged the jury that if it found the contract to be ambiguous it should consider "all evidence in the record" to resolve the ambiguity. (R. 1740-42, 1750.) He further charged that if the jury found the contract free of ambiguity it should consider only the

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* References to the record are cited as "R." and the page number. References to the supplemental record, consisting of the briefs to the Fifth Circuit, are cited as "Supp. R." and the page number.

written contractual provisions in disposing of the issues. (*Ibid.*)

The trial court also required the jury to consider the charge of conspiracy which had been made against petitioners. However, the court directed the jury not to consider, on the issues of liability and damages, pre-December 1957 evidence, much of which had been adduced by petitioners for the specific purpose of rebutting the conspiracy charge. (R. 1739-40, 1752.)

The jury returned a verdict of $1,900,000 for respondent. (R. 1754.) Petitioners then moved for judgment notwithstanding the verdict, and alternatively for a new trial or for a remittitur. (R. 1781.) These motions were argued in November, 1963, at which time Judge Ellis termed the jury verdict a "shocking award." (R. 1886.) Seven months later, in June, 1964, Judge Ellis entered judgment n.o.v. for petitioners without explanation; he denied petitioners' alternative motions for new trial or for a remittitur, likewise without stating his grounds as required by Rule 50(c)(1). (R. 1939-40.)*

On cross-appeals, the Court of Appeals reversed. It set aside the judgment n.o.v. and reinstated the jury's finding as to liability. (p. 3a, *infra*.) 374 F.2d 390 (1967). At the same time the Court of Appeals held that the amount of damages awarded by the jury was excessive and unfounded as a matter of law and remanded the case to the district court for remittitur or, at the option of the plaintiff, a new trial on the sole issue of damages. The Court of Appeals subsequently denied, without opinion, the petitioners' petition for rehearing.

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* Judge Ellis is now retired.

In its decision the Fifth Circuit upheld the district court's refusal to grant a new trial on two basic grounds. First, it rejected petitioners' contention that the trial court erred in leaving to the jury the judicial function of determining whether or not the agreement was ambiguous. The Fifth Circuit held, curiously, that the trial court's failure to exercise that judicial function amounted to a proper charge that the contract was ambiguous. (p. 40a, *infra.*)

Second, the Fifth Circuit likewise brushed aside the trial court's refusal to permit jury consideration of petitioners' evidence to rebut the conspiracy charge. This ruling was based upon the erroneous premises that the conspiracy issue was not before the jury and that the evidence on conspiracy went solely to damages, even though the trial court's instructions made no such distinction. (p. 39a, *infra.*)

Petitioners now seek only a new trial on the issues of liability and damages; they do not request reinstatement of the judgment n.o.v.

REASONS FOR GRANTING THE WRIT

1. The District Court Violated Federal Civil Rule 50(c)(1) by Failing to Specify any Reasons for Denying Petitioners' Alternative Motion for a New Trial

In upholding the District Court's denial, without explanation, of petitioners' motion for a new trial, the Court of Appeals disregarded the explicit language of the 1963 Rule 50(c)(1) of the Federal Rules of Civil Procedure which requires district courts to "specify the grounds" for denying such a motion when coupled with the grant of a motion for judgment n.o.v. Thus, the decision below presents an important question of

federal procedure which has not been, but should be, decided by this Court—namely, whether a verdict loser is entitled to have the district court state the basis for its denial of a motion for a new trial after grant of an accompanying motion for judgment n.o.v. Review by this Court is needed to assure compliance with the specific requirements of a new federal rule and to make clear that the rights of verdict losers are entitled to as much protection as those of verdict winners.

Rules 50(c) and 50(d) dealing with motions for judgment n.o.v. were 1963 additions to the old Rule 50(b). That rule, in turn, had sought to dispel pre-existing confusion as to the procedure for making motions of this kind. It required the verdict loser seeking judgment n.o.v. to have moved previously for a directed verdict, *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940), and to have filed the motion within 10 days after the jury verdict, *Johnson* v. *New York, N.H. & H.R.R. Co.*, 344 U.S. 48 (1952).

But old Rule 50(b) did not affect the traditional grounds for granting motions for judgment n.o.v. or alter the distinction between that motion and a motion for a new trial. The former required a showing that, viewing the evidence in the light most favorable to him, the "opponent of the movant had failed to make a case"; the motion for a new trial was directed at the discretion of the trial court "in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair . . . and may raise questions of law arising out of substantial errors in the admission or rejection of evidence or instructions to the jury." *Montgomery Ward & Co.* v. *Duncan, Id.* at 251.

Rules 50(c) and 50(d) were designed to further clarify the procedures by which simultaneous motions for judgments n.o.v. and for a new trial could be made and should be decided. Their adoption in 1963—as was true of old Rule 50(b)—was not intended to modify the requirements for nor the differences between motions for judgment n.o.v. and motions for new trial. *Neely* v. *Eby Construction Co.*, 35 L.W. 4253 (Sup. Ct., March 20, 1967); *Gordon Mailloux Enterprises, Inc.* v. *Firemen's Insurance Co. of Newark, N. J.*, 366 F.2d 740, 741-742 (9th Cir. 1966). Rule 50(c)(1) covers the disposition of motions for new trial where motions for judgment n.o.v. have been granted. It states explicitly that the court shall rule on such motions and "shall specify the grounds for granting or denying the motion for the new trial." The Advisory Committee made clear that this was to be a mandatory obligation. Its notes stated that ". . . the court is *required* to state its grounds for the conditional ruling." (Emphasis added.) See 28 U.S.C.A., Rule 50 (1966 Supp.). The Rule therefore made obligatory the practice preferred by this Court in *Montgomery Ward & Co.* v. *Duncan*, where it set forth the duty of the trial court as follows:

> "Whatever his ruling thereon [on motion for judgment n.o.v.] he should also rule on the motion for a new trial, indicating the grounds of his decision." (*Id.* at 253.)

Although neither the Advisory Committee nor this Court identified the reason for the requirement of specification, a logical basis for the rule lies in the difficulty of reviewing the disposition of a motion for a new trial without knowledge of the basis for the

action of the trial court.* It is one thing for a court of appeals to pass upon the district court's action, without explanation, on a motion for judgment n.o.v.; the appellate tribunal is then called upon merely to exercise the same legal judgment applied by the district court—*i.e.*, whether, viewing the evidence in the light most favorable to the verdict winner, there was still a complete failure of proof on his part.

But it is something else again to have an appellate court pass upon the disposition of a motion for a new trial without knowing the basis for the trial court's action. Such a motion frequently is directed to the trial judge's discretion—to his appraisal of the witnesses, to his "feel of the case." *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). It calls for the application of a "perspective peculiarly available to him alone." (*Ibid.*) See also *Neely* v. *Eby Construction Co.*, *Id.* at 4526, and Notes of Advisory Committee, 28 U.S.C.A. Rule 50 (1966 Supp.). That is particularly true in a hotly contested case such as this which involved sharp conflicts of testimony, bitter intra-family feelings and a trial lasting for some three weeks.

Just as a court of appeals cannot place itself in the position of the trial court and require the latter's "feel of the case," so likewise it cannot adequately pass upon the district court's exercise of its admitted discretion unless the appellate court knows the basis for that exercise. *Cf. Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949).

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* The Fifth Circuit noted: "That the trial court did not divulge the reasons for its judgment obviously makes a difficult case more difficult." (pp. 15a-16a, *infra*.)

In passing upon a request for a new trial the appellate court has a more limited function than that of the trial court. The trial court can properly take into consideration a number of factors not open to the appellate court. The appellate court can decide only if the trial court either abused its admittedly wide discretion or applied an incorrect legal standard.* It can discharge neither appellate responsibility in the absence of a statement of reasons on which the trial court acted.

In any event, Rule 50(c)(1) could hardly be more explicit, requiring, in so many words, specification of grounds for granting or denying the motions for new trial after entry of judgment n.o.v. Nor can it be argued, in the light of the drafting history of Rule 50(c)(1), that the specification requirement applies only where motions for new trials are granted. Such a limited requirement was contained in a 1955 draft amendment which was proposed by the Advisory Committee but not adopted. 5 Moore, Federal Practice (1966 ed.) § 5001 (14). That this limited proposal was not adopted thus provides added reason for giving the broad unequivocal language of the 1963 amendment a literal reading. This case, thus, presents the question whether federal courts will be required to carry out the specific mandates of the federal rules or will be permitted to attach their own exceptions and qualifications to important procedural requirements.

Petitioners here filed the appropriate motions at trial. They moved for a directed verdict. (R. 1004,

* Petitioners specifically urged below that the trial judge applied the wrong legal test in ruling on their motion for a new trial, *i.e.*, the test which is applicable to motions for judgment n.o.v. (Supp. R. 166-168.)

1587.) After that motion was denied, and a jury verdict was returned for respondent, petitioners moved within the required 10-day period for judgment n.o.v. and a new trial. (R. 1781, 1789.) Six months later the court entered judgment n.o.v. and denied the motion for a new trial without opinion, reserving the right to specify its reasons at a later date. (R. 1940.) No such reasons were ever given.

On appeal, petitioners contended that the trial court had erred in denying the motion for a new trial, and urged, on brief, that, if the Court of Appeals itself were unwilling to order a new trial, it should remand the case to the District Court for specification of reasons (Supp. R. 168-169), the trial court having failed to specify its reasons, as had been expected. The respondent challenged this view (Supp. R. 236), but the Court of Appeals declined to pass on it. In sum, the matter was properly presented to both lower courts.

2. THE DISTRICT COURT ERRED IN AUTHORIZING THE JURY TO DECIDE THE LEGAL QUESTION OF WHETHER THE CONTRACT WAS AMBIGUOUS OR UNAMBIGUOUS AND THEREBY TO DECIDE WHETHER OR NOT TO CONSIDER EXTRINSIC EVIDENCE.

In authorizing the jury to decide if the 1957 agreement was ambiguous or unambiguous, the decision of the court below is in conflict with the decisions of the Second Circuit Court of Appeals in *Wright* v. *Farm Journal,* 158 F.2d 976 (2d Cir. 1947), and of the Fourth Circuit in *Sprinkle* v. *Davis,* 104 F.2d 487 (4th Cir. 1939).

In the *Wright* case the Court of Appeals held that it was reversible error for a trial court to permit the jury to decide whether the charge of being a commu-

nist was or was not libelous. In *Sprinkle* the court ruled that it was reversible error to permit a jury to decide if the diagonal crossing of a street by a pedestrian was or was not negligence when the applicable state statute provided that such crossing constituted negligence *per se*. Thus, both courts of appeals held that a trial judge could not leave to the jury the disposition of legal issues. Yet that is precisely what the trial court did in the instant case and what the Fifth Circuit has now sanctioned. See also *United States* v. *Continental Oil Co.*, 364 F.2d 516 (10th Cir. 1966); *Evensen* v. *Pubco Petroleum Corp.*, 274 F.2d 866 (10th Cir. 1960); and *J. T. Majors & Son* v. *Lippert Bros., Inc.*, 263 F.2d 650 (10th Cir. 1958).

It is settled that in cases of contract construction the question of the existence or non-existence of ambiguity is a matter of law to be decided by the court. See, for example, *Steele* v. *McCargo*, 260 F.2d 753 (8th Cir. 1958); and *Whiting Stoker Co.* v. *Chicago Stoker Corp.*, 171 F.2d 248 (7th Cir. 1948).

The basis for this well-established rule is simply that the jury is entitled to consider extrinsic evidence as to meaning if the contract is ambiguous but must not consider it if the contract is unambiguous. In short, the rule seeks to insure that the jury can properly carry out its assigned function "to find and determine the facts, not the law." *Glendenning Motorways* v. *Anderson*, 213 F.2d 432, 435 (8th Cir. 1954).* The jury can do this, however, only if it receives the proper legal guidance from the court.

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* The distribution of functions between judge and jury in contract interpretation "is an issue of federal 'procedural' law and is not governed by *Erie* considerations." Meyers v. Selznick Co., 373 F.2d 218, 222, n. 1 (2d Cir. 1966).

The Fifth Circuit below paid lip service to the rule in theory but eviscerated it in practice. It held that the contract was ambiguous and that the determination of ambiguity was a matter of law solely for the judge to decide. But the appellate court went on to say that the trial court's failure to so state was itself an "implied recognition of the agreement's ambiguity." (p. 40a, *infra*.)

This view is error apart from the absence of any reason to believe that the jury could have been aware of the trial court's "implied recognition." If a question is one of law to be decided by the trial court, the court should make its ruling, and instruct the jury accordingly. For the court simply to remain silent is to invite the jury to assume judicial responsibilities which do not belong to the jury and which cannot legally be delegated to it. But Judge Ellis went beyond mere silence. He told the jury to consider extrinsic evidence if it decided that the contract was ambiguous and not to consider such evidence if it decided the contract was unambiguous. (R. 1740.) He thereby compounded the error, for these instructions affirmatively directed the jury to decide the legal question of whether the contract was ambiguous or whether it was unambiguous. In sum, the trial court improperly assigned to the jury the task of disposing of a purely legal question, in conflict with the *Wright* and *Sprinkle* decisions.

As noted heretofore, the Fifth Circuit sought to excuse the action of the trial court on the ground that the failure to instruct on the question of ambiguity or non-ambiguity was the equivalent of an affirmative instruction that the contract was ambiguous. (pp. 39a-40a, *infra*.) The logic of this proposition is impossible

to discern. We do not see how a judge can be said to have instructed a jury that one legal conclusion was correct when that judge, in fact, authorized the jury to reach either the correct conclusion or the opposite and incorrect conclusion. Yet this is the necessary implication of the Fifth Circuit's rationale.

Similarly, the Fifth Circuit's claim that the charge on ambiguity was, if anything, more favorable to the defendants is beyond comprehension. (p. 40a, *infra.*) In fact, the instruction was highly prejudicial. It permitted the jury to reach the conclusion—deemed erroneous by the Fifth Circuit—that the contract was unambiguous. In turn, this conclusion would have precluded the jury, under the trial court's specific instructions, from considering the extensive extrinsic evidence which petitioners introduced as to the purpose of the contractual provisions. (R. 1740.)* Thus, on the premise that the contract was unambiguous, the jury could not have considered petitioners' evidence that they never intended to forfeit their right to vote their stock in any way they believed would benefit the corporations. Yet under the Fifth Circuit's view that the contract was ambiguous (p. 40a, *infra*), the jury should have considered such evidence. Under these circumstances it is impossible to accept the Fifth Circuit's contention that the trial judge's failure decided the question of ambiguity was favorable to petitioners.

The foregoing, we suggest, underscores the importance, in the proper supervision of the federal courts

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* The trial court instructed the jury: "In the construction of a contract that is clear and wholly unambiguous, there is a rule of law that you need not turn to any other evidence or any other matters in order to interpret the meaning of the contract other than the words as used therein." (R. 1740.)

[see *e.g.*, *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 225 (1946)], of insuring that trial courts do not equate silence, or a permissive instruction on a matter of law, with an affirmative instruction. Such a practice would entail an unfortunate blurring of the roles of judge and jury not merely in contract cases but in other cases where there are interlocking questions of law and fact. "In a trial by jury in a federal court the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95 (1931) (Hughes, C.J.).* This Court has consistently sought to maintain as clearly and distinctly as possible the lines of division between these two elements of our federal trial structure. *Neely* v. *Eby Construction Co.*, 35 L.W. 4253 (Sup. Ct., March 20, 1967). It should do so here. Any other course would invite other trial courts to engage in a cavalier allocation of functions between judge and jury, contrary to long-established practice, and would thereby weaken materially that division of powers which has been one of the strengths of our trial system.

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* The words of Justice Story, sitting on circuit in the criminal case, United States v. Battiste, 2 Sumner 240, 243-44 (C. Ct. Mass. 1835), carry particular significance here:

> ". . . If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the Court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain, what the law as settled by the jury, actually was."

3. The District Court Erred in Directing the Jury to Consider Respondent's Inflammatory Charge of "Conspiracy" but not to Consider the Petitioners' Answer to that Charge.

The ruling of the Fifth Circuit with respect to the district court's instructions on conspiracy so departed from the usual and accepted course of judicial proceedings as to call for review by this Court.

The single-count complaint alleged that petitioners had conspired to breach their contract with respondent. (R. 1-5.) At the trial, respondent's counsel attempted to withdraw the conspiracy charge—in an apparent effort to avoid a possible dismissal because of an otherwise applicable one-year statute of limitations. The jury was never informed of the purported withdrawal of the conspiracy allegation; counsel's statement was made out of the presence of the jury and the complaint was never amended to reflect that statement despite the judge's direction to respondent's counsel that this be done.* (R. 1038.) The court charged the jury on the question of conspiracy at both the beginning and end of his instructions. (R. 1738-39, 1747.) He described the complaint as alleging conspiracy and referred to the conspiracy allegation on six occasions in his instructions. (R. 1738, 1739, 1747.)

At the same time, the trial court precluded the jury from considering evidence introduced by petitioners which sought to counter the conspiracy charge. The trial court instructed the jury that it could not consider, on the issue of liability, evidence relating to

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* The Fifth Circuit characterized this failure of respondent to amend his pleadings as "confusing . . . but . . . not fatal." (p. 38a, *infra*.)

events prior to the 1957 agreement. (R. 1739-40.) Yet petitioners had introduced, both on direct and cross-examination, a great deal of testimony relating to this period. This evidence was, in large part, offered and received to meet the conspiracy allegation by establishing that the actions of petitioners were not the product of a conspiracy to deprive respondent of any contractual rights, but, rather, were designed to protect the integrity and effective operation of various family business interests. In other words, petitioners' evidence sought to dispel the conspiracy allegation by establishing purpose and intent which were both legal and incompatible with respondent's conspiracy theory. Strangely, the Fifth Circuit recognized that such was the purpose of this evidence, stating that it "would have relevance mainly to the defenses of independent action or justification for conspiracy," (p. 39a, *infra.*) And yet, as we have noted, the appellate court sustained the trial court's instruction which prohibited the jury from considering that very defense.

Thus, under the district court's instructions, the jury was required, on the one hand, to consider the allegation of conspiracy in the complaint and, on the other hand, to ignore petitioners' evidence directed at that charge. In other words, the trial court instructed the jury to consider the charge but not the defense. The jury thus was precluded from considering evidence directed to an issue affirmatively raised by the instructions, and was thereby prevented from carrying out its proper role as the trier of facts. See *Stinson* v. *Atlantic Coast Line R. Co.*, 355 U.S. 62 (1957), *rehearing denied*, 355 U.S. 910; *Ringhiser* v. *Chesapeake & Ohio Ry. Co.*, 354 U.S. 901 (1957); *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949), *rehearing denied*, 336

U.S. 940; *Tennant* v. *Peoria & P.V. Ry. Co.*, 321 U.S. 29, *rehearing denied*, 321 U.S. 802.

The intrinsic unfairness of this extraordinary instruction was magnified by the fact that in his closing argument to the jury, petitioners' counsel placed considerable stress on the conspiracy issue, setting forth in understandable detail the pre-December 1957 evidence which, he urged, disposed of the conspiracy charge. (R. 48-50, 1671-1688.)*

The Court of Appeals brushed aside, as inconsequential, the one-sidedness of the conspiracy instructions. The court held that the case was exclusively one for breach of contract and that, accordingly, the conspiracy allegations were immaterial. (pp. 38a-39a, *infra*.) But this ruling did not erase or mitigate the prejudice which the conspiracy instructions had visited upon petitioners. The nail may have been withdrawn but the hole remained. The basic unfairness of the charge stemmed from the fact that the jury was required to consider the charge but not the defense. Indeed, if anything, the Fifth Circuit's holding only made matters worse, for if the conspiracy allegation was indeed irrelevant, then what the trial court did

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* Defense counsel was justified in making this argument since the trial judge had admitted extensive pre-December 1957 evidence, over the objection of respondent. (R. 298-327.) Among other things, defense counsel told the jury in his closing argument that the trial judge had ruled "that this pre-1957 evidence is admissible in this case, and that you are entitled to consider it. And we believe that you should consider it as a part of the overall picture, and I think it will help you decide whether or not the defendants did what any person would have done under the circumstances in October, 1959." (R. 1688.) Following the closing arguments, the trial judge, by his instructions, reversed his previous ruling that the pre-1957 evidence was admissible.

was to require gratuitously the consideration of an immaterial charge to which the petitioners were then barred from making any response.

The Fifth Circuit's reference to the alleged withdrawal of the conspiracy charge stands in no better posture. (p. 38a, *infra.*) The court simply ignored the central facts that the jury was not aware of the withdrawal and that the instructions were replete with references to the conspiracy charge. *Cf. Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U.S. 211, 215 (1951); *Bradford Builders, Inc.* v. *Sears Roebuck & Co.,* 270 F.2d 649, 654 (5th Cir. 1959) (it was necessary for trial court to remove from jury's consideration issues which had been withdrawn). And, of course, even if respondent counsel's statement constituted a technical withdrawal, this legal conclusion would not have moderated the actual prejudice stemming from the trial court's charge.

The court below further sought to play down the trial court's error by contending that the conspiracy issue related only to damages. (p. 39, *infra.*) Since damages were to be redetermined, the court of appeals assumed that no injury resulted from the charge. But that court offered no explanation for its conclusion that the conspiracy issue had no bearing on liability, and no explanation suggests itself. For its part, the district court had not limited, directly or indirectly, the conspiracy charge to the issue of damages. Indeed, a fair reading of the portion of the instructions dealing with conspiracy compels the conclusion that the court intended it to bear on all of the issues and certainly on the breach of contract question, which, of course, even under the Fifth Circuit's view of the case, is the critical liability issue. (R. 1738-1739, 1747.)

There is, then, no way of telling to what extent the jury's finding of liability was influenced by the requirement that the jury pass on the conspiracy charge but not on petitioners' rebuttal of the charge. Under these circumstances, the Court of Appeals' disclaimer of prejudice to petitioners appears to be no more than after-the-fact rationalization.

We would concede that in most cases the inclusion in the jury instructions of a charge on an immaterial issue which one side was not allowed to contest would afford no compelling basis for review by this Court. This would be particularly true in a case where the charge was painted in pastel shades. This is not such a case. Here, the charge involved was inflammatory by nature. "Conspiracy" conjures up impressions of conniving, of dissembling, of skullduggery. If not a "fighting word," see *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942), "conspiracy" is close to it.

A charge of "conspiracy" suggests the commission of a crime or is inherently damaging to the target's trade or profession. It is no wonder, then that such a charge is generally considered to be libelous or slanderous *per se.* Gatley, *Libel and Slander* (5th ed. London 1960), pp. 48-51. Certainly, since petitioners are business men who depend on commercial contracts, there can be little doubt that any libel suit brought by petitioners because of allegations of conspiracy to breach a contract—if made outside a judicial proceeding and therefore not privileged—would have gone to a jury either as libelous or slanderous *per se* or as sufficiently ambiguous on that score to call for resolution by the jury. *Riss* v. *Anderson,* 304 F.2d 188 (8th Cir. 1962) (actionable imputation of criminal offense need not be stated with precision); *Empire Printing*

Co. v. *Roden*, 247 F.2d 8 (9th Cir. 1957) (jury should decide whether allegedly defamatory language is susceptible of two interpretations); *Gatley, Id.* at 51, n. 49.

The prejudicial nature of the conspiracy instructions emphasizes the importance of review by this Court. We know of no prior case where a federal appellate court has sanctioned instructions which required the jury to pass on an inflammatory charge yet prevented the jury from considering evidence tending to rebut that charge. Such a practice should not be countenanced. It should be discouraged.

CONCLUSION

Accordingly, petitioners urge that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX